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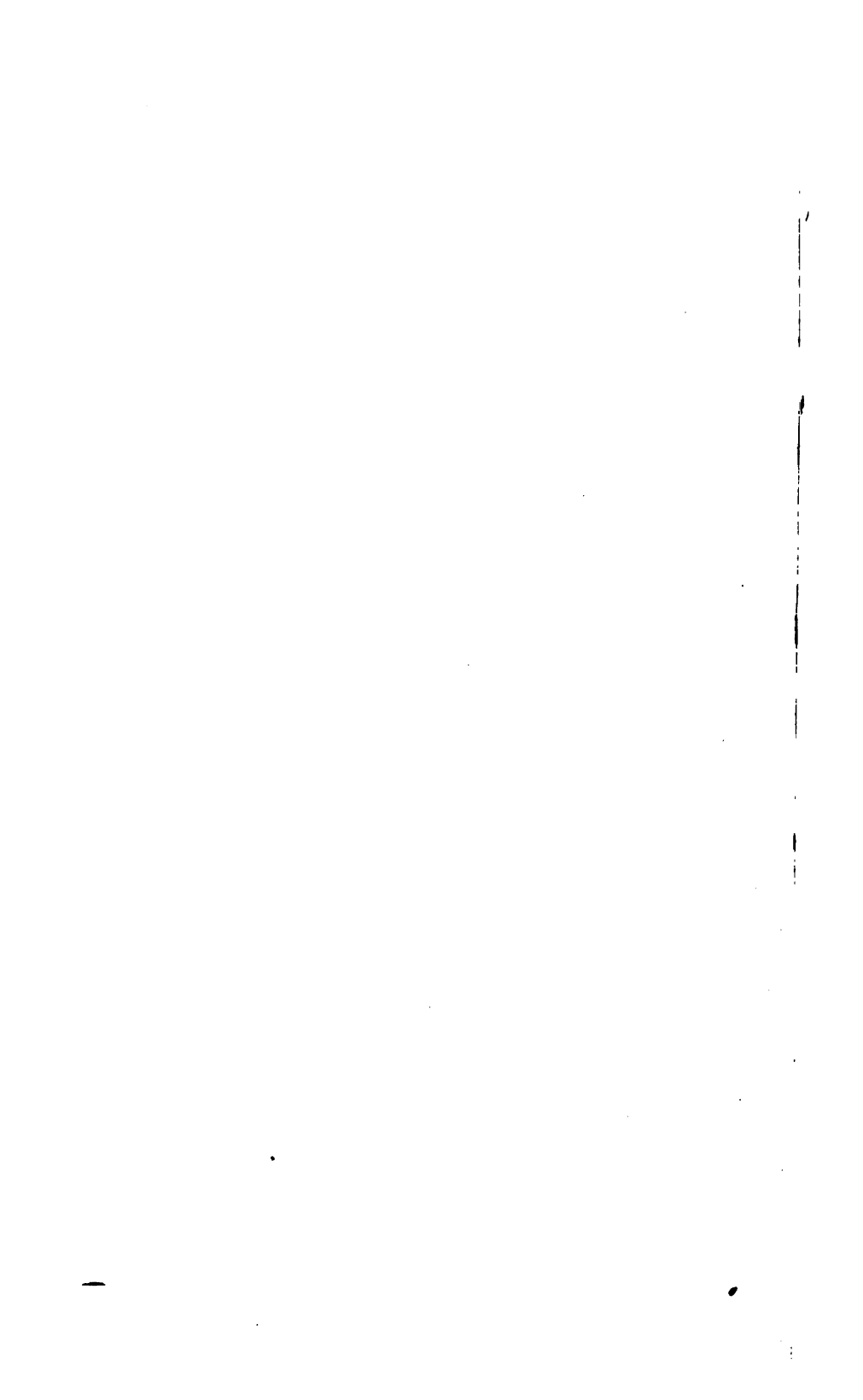
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SECOND.

LEGAL ARGUMENT

ON THE

TOLERATION ACT.

WITH A POSTSCRIPT,

IN WHICH "AN ANSWER TO A LEGAL ARGUMENT" IS BRIEFLY
CONSIDERED.

BY A BARRISTER AT LAW,
OF LINCOLN'S INN.

[*Price 2s.*]

W. Hesling, Printer Hall Court Upper Thames Street,

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PARTICULARLY WITH REFERENCE TO THE POWER OF THE
QUARTER SESSIONS TO EXAMINE AND REJECT PERSONS
CLAIMING TO QUALIFY UNDER THE
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SECOND

LEGAL ARGUMENT,

&c. &c.

THE discussion of the Toleration Act has already produced advantages of great value, in removing important difficulties, and clearing away a considerable mass of prejudice and error. Its various provisions will scarcely be again confounded, nor will that beneficent act of an enlightened legislature be any longer suspected of holding out a temptation to commit abuses, which it is wholly incompetent to render effectual, when committed. Persons will not be supposed to assume a false character, for the purpose of obtaining such a *licence*, as it is now so universally understood that the magistrates have no power to grant, that the very word has little chance of being again employed in the controversy: and since it has been well ascertained, that protection against punishment is conferred on one set of men, freedom from burthensome civil offices on a second class, and exemption from military service on a third, it will hardly be imputed to those who labour

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to bring themselves within the first description, that they have done so with the fraudulent design of enjoying privileges, which are strictly confined to the two latter, or of embezzling from the magistrates an advantage, which it rests exclusively with others to bestow. In a word, the truth has become manifest, that the only rational motive which can prompt any man to apply for permission to qualify at the court of Quarter Session, under the eighth clause of the Toleration Act, is a real apprehension that he will be exposed, if unqualified, to severe penalties, and that he is of the description entitled to that protection, which is made to depend on such qualification.

Whether indeed he has a legal *right* so to protect himself, or must continue liable to those penalties, unless the magistrate shall be pleased, in the exercise of a discretionary power, to suspend them in his favour, is in some degree a different question, which has not yet been in terms decided, and which (if it is still seriously contested) merits the most attentive consideration. And supposing it shall hereafter appear that they are not invested with this discretion, but that they are bound to administer the oaths to all applicants who may bring themselves within the description of persons to be relieved, it may still be open to debate, in what manner, and by what evidence, and in what form of proceeding, such description is to be made out; whether the court can properly rest satisfied with the assurance of the applicant himself, or is called

upon to put a judicial construction on the words of the act, authorized to demand an explanation of the sense in which the individual may understand them, and empowered to require evidence of the truth of those facts, by which he would establish his claim to qualify.

The investigation of these questions, thus brought within the narrowest compass, is the object of the present argument:---I. Are the magistrates in Session empowered to refuse qualification to those who fall within the eighth section? II. What power have they to institute an enquiry whether persons applying are or are not within that section?

I. A detailed repetition of the enactments contained in the several statutes of Charles the Second, and William and Mary, so fully and perhaps tediously set forth in the "Legal Argument,"* is here unnecessary. It will be sufficient to remind the reader of a very few of their leading provisions.

The *Act of Uniformity*, sometimes called the Bartholomew Act, after depriving of all his spiritual promotions every minister who should not declare his assent and consent to all things contained in the Liturgy of the Church of England, imposed a fine of £100 on persons consecrating or administering the sacrament of the Lord's Supper, without episcopal ordination; and in-

* P. 3 to 8. p. 12 to 19.

flicted three months imprisonment on every lecturer who should preach or lecture without a licence from the bishop or archbishop, or without having read the Thirty-nine Articles, and declared his assent, &c.

By the *Five-Mile Act*, all persons in Holy Orders, &c. who had not complied with the Act of Uniformity, and who should not also take the oath of non-resistance, and all persons who should preach in any unlawful assembly, were to forfeit: £40 if they came within five miles of any corporate town, &c. or if they taught any school, or took boarders for instruction. And all such offenders are to be committed to gaol for six months, without bail or mainprize, by two justices, unless they will take the oath, and subscribe the declaration.*

The Conventicle Act† imposed on all who should preach at any Dissenting Meeting, a penalty of £20. for the first, and £40. for every subsequent offence.

These are the three Statutes enumerated in the eighth Section of the Toleration Act, and of which it is thereby declared that the penalties shall at-

* It was decided in a case of *Powell v. Weeks, Skinner, 83*, that the same party may, for the same offence, be imprisoned under one clause, and mulcted in the £40 penalty under the other.

† At the time of passing the Five-Mile Act, a different Conventicle Act, (16 Car. 2. c. 4) was in force, which made preachers liable to transportation for the third offence, and felons, if they escaped, after conviction. It was continued for three years only.

tach on "no person dissenting from the Church of England, in Holy Orders, &c. nor any preacher, &c. that shall make and subscribe the declaration," and take the oaths, and subscribe the Articles, which are there particularly described.

Thus suspended with respect to those who comply with the conditions imposed by the eighth Section, the penal Laws are however still in force as to all who do not perform them. The Act of Uniformity still inflicts the forfeiture of £100. on every Presbyterian Minister, and every other person not episcopally ordained, who officiates in the administration of the Lord's Supper; the Five Mile Act still menaces with fine and imprisonment such Ministers as presume to venture within five miles of a corporate town, or instruct a pupil, without declaring their conformity, or without swearing that it is not lawful upon any pretence whatever to take up arms against the king, or those that are commissioned by him, and that they will not at any time endeavour any alteration in Church or State: and the Conventicle Act still visits with its accumulating fines all Preachers, except those belonging to the established Church: unless these several persons will consent to give those securities which are required by the Act of Toleration. That law enables them to commit with impunity the various acts above enumerated, on fulfilling certain conditions; but those who persist in doing such acts, and yet do not fulfil the conditions, still continue to be criminals within the antecedent Statutes.

nally to be employed. The declaration of indulgence* issued by Charles II. on the fifteenth of March, 1672, which suspended the penal Laws against nonconformists, prohibited however their meeting in any place of religious worship, "until such place be allowed, and the teacher of that congregation be approved by us." Here we have, in the strictest sense of the word, a *licenced teacher*: and the phrase, when once grown into use, would easily be adopted under circumstances, to which it was less properly applicable. James II. in his famous declaration for liberty of conscience † (April 4, 1687,) suspending all the penal laws against dissenters of every description during pleasure, required in the same manner that the justices should be made acquainted with the places set apart for purposes of Religion, and made an offer of royal dispensations to all the king's subjects, who had violated the Test and Corporation Acts, by not taking the necessary oaths. Calamy, in his Life of Baxter, relates that an office for *licences or dispensations* was opened, where they were obtained for 50s. apiece. These *licences* were therefore extended generally to all nonconformists; and the word, thus introduced, long before the Toleration Act, kept its ground in discussions of the subject, though afterwards employed with a degree of incorrectness, which has materially favoured

* See the 2d. volume of Echard's History, p. 292.

† Ib. p. 316.

the vulgar error, attributing a discretionary power to the Magistrates. *

II. Taking it then for proved that no such power exists, in the case of those who bring themselves within the eighth section, we may proceed to enquire in what manner such persons are to establish the fact of their filling any of the characters to which exemptions are by that section granted;

* When referring to the history of those times, it may be proper to mention, that two attempts were made in the reign of Charles II. to comprehend presbyterians within the pale of the Church, and that two Bills were also brought into Parliament, with great probability of success, for granting a full legal indulgence to the nonconformists. Mr. Echard (vol. 3, p. 316.) has preserved the heads of one introduced into the House of Commons on the 27th of February, 1673, which passed that assembly, and was carried to the Lords, but was defeated by a prorogation. It seems to have served in some degree as a model for the Toleration Act, though its terms are far less general. It was described to be *for the ease of his Majesty's subjects, dissenters in matters of Religion from the Church of England*, and provided that dissenters taking the oaths of allegiance and supremacy, and subscribing the articles of the *doctrine* of the Church (in contradistinction, it is presumed, to those relating to discipline) should be eased from all pains and penalties for not coming to Church, or for meeting together for the performance of any religious exercise. The Clause in the Act of Uniformity for declaring *assent and consent* was taken away. Teachers were to give notice to the Quarter Sessions, of the intended place of meeting, and were to make subscription, and take the oaths, of which they were to receive a certificate. The doors of places of worship were not to be closed. Dissenters refusing the Church wardens' oaths, were to provide deputies.—The other Bill, *for exempting his Majesty's protestant subjects, dissenting from the Church of England, from penalty imposed upon the papists by the act of the 35th of Elizabeth*, passed both houses, but was secreted by the Clerk of the Parli-

whether their own assertion, made in the words of the statute, is sufficient to procure them leave to qualify, or whether the Court empowered to administer the oaths, is also empowered to ascertain by any and what evidence, that he to whom they are administered is in such a situation, as to derive from them the benefits, which it was in the contemplation of the Toleration Act to bestow. An opinion in favor of the former alternative has been already hazarded,* it is feared with too much rashness, as some doubt appears to have been suggested of its accuracy,---not judicially indeed, but incidentally,---by an authority, whose lightest word is entitled to the most respectful notice, as it demands the most careful examination.

In the first place then it may be observed, that if this power of scrutiny be vested by law in the Court of Quarter Session, it is granted by no express words, nor is to be collected by necessary implication from the language of the statute. Neither the eighth clause, nor any other section of the Toleration Act, enjoins that Court to enquire whether the applicant answers any particular description; the administration of the oaths is not postponed to the period when the Court shall be satisfied of that fact, and shall have pronounced judgment accordingly: no power is in terms created, except a power to administer the oaths. This alone will hardly be said *necessarily* to involve amendment, when the royal assent was given to the Bills prepared by both houses, and so lost at the prorogation. Echard. vol. 3, pp. 602, 607, 619.

* Legal Argument, p. 35.

an authority to examine whether an applicant actually fills the character, in which he desires to take them; the practice under the Test Act* is decidedly at variance with any such notion. Excisemen, custom-house officers, several other inferior functionaries, are required to go before the Sessions, and there take certain oaths connected with their several public duties: but it has never been adopted as the practice, or considered as the right, of that respectable Court, to set on foot any enquiry into the truth of the fact of their being appointed. The Archdeacon, who has the power of swearing in churchwardens, has been held to be merely ministerial in the execution of that duty (1 Stra. 609); and in all cases of this nature, a sufficient security appears to exist against the abuse and profanation of administering the oaths unnecessarily, because no person has any interest in taking them, except those who are by Law required to do so.

But the power of scrutiny, if not devolved upon the magistrates by the express words of the Act, has certainly never been recognized as belonging to them, by any judicial interpretation of it. Among the very few legal decisions, which it has undergone, only one person seems to have found it necessary to apply to any of the superior Courts for redress, under the eighth section. A Dissenting Minister, called in one of the books *Pent*, (6 Mod. 226) and *Pewck* in another (2 Salk. 572),

* *Ib.* p. 29.

having been convicted of preaching in a county where he had not qualified, complained of his conviction as a contempt against the Toleration Act; and his counsel, the attorney general of that day (Sir Edward Northey) actually moved the King's Bench for an attachment against the convicting justice. But the Court said "*The Act of Conventicles is still in force, and the justices of peace have power of executing it against such as do not qualify within the Act of Toleration; which Act only enjoins the justices of peace to acquit such as do comply with the Act of Toleration.*" Perhaps this case might suggest the statute afterwards passed in the same reign, by which qualification in one county was declared to excuse the offence of preaching, when committed in any other.

The same person applied a second time to the Court (6 Mod. 310), for a mandamus to the justices of Warwickshire, to admit him "to take the oath of allegiance, and to subscribe, according to the Act of Toleration, in order to qualify him to teach a dissenting congregation; and it was granted. And per Holt, Ch. Just.--The party ought to suggest whatever is necessary to entitle him to be admitted; and, if that be not done, or if it be done and the fact be false, that will be good matter to return." What more passed on the occasion, we are not informed, and might in vain conjecture; though probably some observations at the bar drew from the Chief Justice the well known truisms, that he who applies for a mandamus must shew a full title to the benefit he

claims; and that, if he state an essential fact falsely, that fact may be negatived in the return. But under what denomination this individual had presented himself at the Sessions, and in what manner the Court thought his claim ought by law to be made, whether in the words of the eighth section, or in some more detailed periphrasis, such as justices may deem equivalent to those words,---whether they are to institute any inquiry and in what manner they are to conduct it,---on these points we are left as completely in the dark, as if the report had never reached our times. If the justices had chosen to assert, on their own responsibility, that *Peat* did not fill the character under which he claimed to qualify, the return would have been good in law, though liable to be questioned in fact: that they did afterwards make any such return is improbable, because it would in all probability have been again brought before the Court, again argued, and reported. But in whatever stage of the proceedings they had admitted him, he would have acquired no privilege, unless he came within the proper description. Thus, in the *King v. the Justices of Derbyshire*,* the Court said, that if the persons resorting to a meeting house did not bring themselves within the Act of Toleration, the registering of it would not protect them. In that case, Lord Mansfield held the following language: "no inconvenience can attend the registering of this Meeting-house. The Registry and Certificate do not prove that they are

* 1, Sir W. Black. Rep. 606. 4 Burr. 1991,

within the Act; they will still be obliged to shew that they are within the requisite qualifications, if called upon, notwithstanding the Register and Certificate; and if in fact they are not within the qualifications, the justices may return that they are not, if they think proper to do so." Every word here (*mutatis mutandis*) may be applied with equal propriety to qualifying under the eighth clause. No inconvenience can ensue from swearing in the applicant, who, if not within the class, to whom protection is afforded, will merely have taken the oaths in vain. The Magistrates may at their peril (if they think proper to do so) return to a mandamus, that the person wishing to be sworn is not within the 8th clause, or the Meeting-house wished to be registered is not within the 19th; the contrary may by possibility be known to them, as individuals, but they do not therefore possess an authority to inquire, as judges, into the fact, in either case; and as, in the latter, they have been expressly decided to be *merely ministerial*, it seems very difficult to understand how they can be judicial in the former.

This power of scrutiny then, if it exist at all, must be deduced by reasoning from the peculiar nature of the enactment in question, with reference to the objects whom it professes to relieve, and the kind of relief which it proffers to them. And though there may be some difficulty in assigning a distinct shape to the argument arising from these circumstances, it will probably receive no great injustice, when stated in terms like

these:—that the extreme ambiguity of the language, by which the several persons mentioned in the eighth clause are described, renders it absolutely necessary that the magistrates should have ample authority to ascertain what construction is put upon it, by every person applying, and in case that should differ from the construction adopted by themselves, to reject the application: that the danger of granting unlimited admission to all, who think proper to claim it in the words of the Act, creates a necessity for their enjoying the most enlarged powers of enquiry, adjudication, and rejection. All these propositions will therefore be successively considered.

As to the obscurity of expression imputed to Lord Somers, and the other framers of the Toleration Act, it has surely been much exaggerated; and will probably be at once removed, by a little attention to the former laws on the same subject, and the circumstances of the times which had just gone by. No one appears to hesitate, indeed, as to any of the denominations within the scope of the eighth section, except the class *pretending to Holy Orders*,—a phrase, first introduced into the law of England by the Five Mile Act. Let us see then what was the object and effect of that Act.

At the moment of the Restoration, all the ecclesiastical property and influence of the country had fallen into the hands of incumbents, who had submitted to the usurping powers. Some of them had been placed in sequestered livings, in lieu of

those who forfeited them for their attachment to the royal cause. All these were displaced on Charles's return, and the original incumbents (if living) restored. But during the twenty years of civil commotion, that ended in 1660, many vacancies were made by death, and were from time to time supplied, without violence or injury, by such ecclesiastical persons, as were in favor with the then ruling powers. During the early part of the civil war, therefore, priests regularly ordained by Bishops, would be promoted: when the lords and commons established the Presbyterian Church, vacant livings would be bestowed on those who received their authority to preach from the Scottish Communion, or the continental Reformed Churches, or finally from the English Presbyterian Synod, which was invested with the power of admitting Ministers by the well known ordinance of 1645; but when the army had introduced that ecclesiastical anarchy, that prevailed under the Long Parliament, and during the Protectorate, the ministers most likely to obtain preferment, were such as had erected themselves into preachers among the prevailing Sects, the Independents, Baptists, &c. Among these no form of ordination existed; but the pastor proclaimed himself a person qualified to communicate religious instruction, and moved to undertake it, by that divine call, which is also considered as essential by the Episcopal and Presbyterian Churches: and the justice of the claim was recognized by his congregation.

The Act of Uniformity pronounced a general sentence of deprivation against all these three classes of incumbents, unless they would declare their assent and consent to the doctrines of the Church of England, and full submission to her discipline, on or before St. Bartholomew's day, 1662. And the historical fact is well known, that more than two thousand were accordingly ejected from their livings. About three years from that time, Parliament, dreading the political influence of the ejected ministers over their several congregations, but extending its provisions, as is not unusual, considerably beyond the mischief to be obviated, passed the Five Mile Act, requiring the oath of non-resistance to be taken, and the assent and consent to be declared by *persons in Holy Orders, or pretended Holy Orders, or pretending to Holy Orders*. Now it seems to be generally admitted, that the two former classes consist of priests episcopally ordained, and ministers of the Presbyterian Church: and may we not safely conclude, that the third phrase was intended to comprise the only remaining description of ministers,---the un-ordained or self-ordained teachers of the Independents, Baptists, and other sectaries?

There is another class of men connected with the religious worship of the Dissenters, who may also, and it appears with justice, be comprehended within the expression, *pretending to Holy Orders*,---the students for the ministry, looking forward to future ordination, not with a vague

purpose of demanding it at an indefinite period, but as actual candidates for it, as soon as they shall find a congregation ready to receive them, and be themselves qualified for the duty of instruction; and in the meantime undergoing a regular course of preparation for their intended office, of which the most important part is the exercise of their powers of elocution, in the presence of a religious congregation. This preparatory exercise, peculiarly necessary in the Presbyterian and most other dissenting churches, because in them no person is admitted a minister till he has been heard and approved by some congregation; is an offence against the Conventicle Act, and can only be protected under the Toleration Act, by the phrase *pretending to Holy Orders*. A remarkable confirmation of the probability of its being so protected, is pointed out by Mr. Smith, in the Ordinance of the Lords and Commons, which suspended the prohibition against preaching, in favor of those who, intending the ministry, should occasionally preach to an auditory, "for trial of their gifts."

These considerations appear to warrant a belief that the words of the Law, which have been stigmatized as wholly destitute of meaning, had a distinct reference to two classes, whose situation must have been perfectly understood, and had been expressly recognized; and the circumstances of the times appear to furnish at least as suitable a key to the intention of the legislature

of 1689, as another Act of Parliament, promulgated just ninety years after, which was lately cited as explanatory of the former. The 19 Geo. III. was truly stated to be applicable to the same objects as the 1st William and Mary; but inasmuch as its favor is extended to persons in Holy Orders, &c. *being* teachers, &c. and it requires the two characters to be united in the same person; therefore the Act of William and Mary was said to extend its relief to those only, in whom that union exists.—Unquestionably it does require that union in the *eleventh* section, where exemption from offices is conferred; but in the *eighth* section which only relieves from penalties, the disjunctive is studiously employed, for the very purpose of keeping those characters separate.*

But if this account should not be deemed satisfactory, still the object of the eighth clause ap-

* To this point may be quoted Cator's Case, Skinner's Reports, 80. "Cator was taken within five miles of a corporation, which sends burgesses to Parliament, and was committed for refusing to take the declaration of assent and consent, he being (indeed) a Presbyterian Parson; whereupon he brought an Habeas Corpus, and this cause was returned, &c. and exception taken, for that it is not shewn on the return that he had preached since the Act of Oblivion, and if not, that he is not within the Statute 17 Car. 2. but upon reading the Statute, three of the justices were of opinion that any person pretending to Holy orders, or pretending to have Orders, was within the Statute; and so the exception not good, Pemberton Chief Justice hesitated."—It was held therefore, that a person answering the description of being in pretended Orders, or pretending to Orders, was liable to punishment under the Five Mile Act, though he did not *also* fill the character of a preacher.

pears to exclude, rather than extend, the power of the magistrates in session, curiously to enquire into the description of claimants, who wish to take advantage of its provisions. For we should constantly remember that it merely adopts that comprehensive phraseology by which the Five Mile Act inflicted its widely spreading penalties on all persons who exercised, or claimed to exercise, any spiritual authority, not derived from Episcopal Ordination. The benefit bestowed by the remedial law, ought surely to be at least as extensive as the visitation of the vindictive one. If then the description of *pretending to Holy Orders* would have sufficed to convict an offender, and if his own statement that he did so pretend, would be not only the best, but in truth the only evidence, by which he could be convicted, why should the measure of liberality be more confined, or how indeed can the evidence of description be different?

Let us go back to the days of Charles the second, and put a case, which appears by no means unlikely to have happened. Let us suppose that some sectarian minister, convinced by argument, or worn down with persecution, wishing to reside without molestation in some town corporate, presented himself at a Court of Sessions, for the purpose of complying with the rigorous terms, on which impunity is tendered by the Five Mile Act. He may be conceived to represent himself to the assembled magistrates in the

words of the Act, as a person pretending to Holy Orders, who wishes to declare his assent and consent to the book of Common Prayer, and to take the prescribed oath of non-resistance. Can the slightest doubt be entertained, that by the description thus given of himself, he at once made out a full title to subscribe the declaration, and to take the oath? But it has been already shewn, that the only operation of the eighth clause upon the act in question, was to substitute a different declaration for that of complete assent and consent, and a different oath for that of unqualified non-resistance. By what process then can the description, which was clearly sufficient in the one case, have suddenly become totally unsatisfactory in the other?

We are at liberty however to reverse the case, and make the contrary supposition. We may imagine that though fully resolved, when he described himself and announced his intention, the applicant was seized with unexpected scruples, and repenting of his design, retired, without signing the declaration, or taking the oath. Should he afterwards be hardy enough to visit his friends in that corporate town, which he was prohibited from approaching within five miles; and be carried before two justices, as a person pretending to Holy Orders, found within five miles of a corporation, without having taken the oaths, or subscribed the declaration required, the case would be instantaneously made out against him;

the important fact of his *pretending* being at once supplied by the magistrates themselves, who saw him appear, and heard him urge that pretence, at the Quarter Sessions. The law clearly attaches on him; he forfeits £40, and is sent to prison for six months, without bail or mainprize. And yet when this very man applies to the same sessions after the Revolution, for leave to qualify within the eighth section of the Toleration Act, the argument we are now considering would invest that Court with full power of examining the nature of his pretence, his definition of Holy Orders, the facts on which that pretence is grounded, and by which it is evidenced; and they may ultimately refuse him his qualification, in case they should pronounce him mistaken in his views, or not sufficiently supported in his statements by such documentary or oral testimony, as they may choose to demand.

Unaccustomed to regard the severe laws of Charles the second, as still in existence, after their complete practical suspension during so many ages, the reader may at first sight be disposed to treat these hypothetical examples very lightly, as apparently unreal, and almost even ridiculous. But a very cursory perusal of the domestic histories of the time which intervened between the Restoration and the Revolution, will convince him that no extravagant cases are here supposed, but that the laws in question were enforced with terrible activity, avenging

the sin of schism, and visiting the crime of dissent, with the most extensive misery and ruin to individuals. Even the law books which relate to the same period, record a multitude of decisions resulting from them; though in the immense majority of such cases, the parties must have been unable to appeal against the convictions of the justices, to whom they were all in the first instance referred.* And the only object, because the only effect, of confirming to the magistrates a power in any case of rejecting applicants, is the revival of those long dormant statutes, which it is difficult for any Englishman to remember without shame, or for any man to contemplate without indignation.

In whatever manner therefore the eighth section is considered, whether in relation to its meaning or its consequences; the former laws must unavoidably form a very material and prominent part of the enquiry. But if, after all, they shall be thought to leave its construction as difficult, and its design as inaccessible, as that of a modern tax bill, still the argument for grant-

* A remarkable proof of the frequency of these convictions before magistrates, occurs at p. 233, of Sir T. Jones's Reports, where it is stated, that all the judges met at Serjeant's Inn, and came to several resolutions on points arising out of the Conventicle Act, which the justices of the peace had submitted to their consideration, when travelling the circuits. And the Chief Justice of England, Sir Edmund Sanders, one of the greatest lawyers ever known, thought it worth while to compose a commentary on the Conventicle Act.

ing to the magistrates the right, or rather imposing upon them the arduous duty, of interpreting it, does not appear to be much advanced. There is something rather singular in contending that, because the legislature is ignorant of the meaning of its own acts, or purposely leaves them ambiguous, the court of Quarter Session shall be obliged to expound the oracle, and find or make a meaning for them. The suspicion of being thus blind to the effect of their own language, is indeed confined to the parliament of King William; those who punished could not well be in the dark as to their intention: but it is possible, that those who relieved from a punishment, which they might think, under all circumstances, equally impolitic and unjust, might simply determine on the relief of *all* liable to it, without knowing or caring what manner of men they were. But if King William and his parliament were thus ignorant, what compulsion is there upon the Quarter Sessions to be better informed? And why may not they, as well as the legislature, rest satisfied with knowing that the penal acts are still in force, that the party applying for relief believes himself to be in peril from them, and that he wishes to perform those conditions, upon which indulgence is made to depend?

The general principle of law seems at least to require, that where the legislature has left it doubtful how far its benignity shall extend, that

doubt shall not operate to the injury and exclusion of the parties to be relieved; and this principle is so forcibly and perspicuously stated by Mr. Justice Heath, in the last number of Mr. Taunton's Reports,* that the author cannot refuse himself the pleasure of transcribing one or two sentences from his Judgment. The argument there turned on the sufficiency of a ship's registration for the purpose of sale, under the 34 Geo. 3. c. 68; but notwithstanding the apparent disparity of circumstances, his course of reasoning is extremely applicable to the present enquiry. After observing, that "though this statute be remedial, yet it is very penal in all its requisitions, if not complied with," and that it was "made for the advancement of trade and commerce, and to regulate the conduct of merchants," the learned judge proceeds to say: "If laws of this sort be not perfectly clear and intelligible to persons of their description, the legislature, by the use of such ambiguous clauses, would lay a snare for the subject: a construction which conveys such an imputation ought never to be adopted. I think that the same rule ought to obtain here, as in the construction of clauses inflicting pains and penalties in the revenue laws; *if they be ambiguously and obscurely worded, the construction is ever in favour of the subject, for this plain reason, that the legislature is ever at hand to explain its own*

* Hubbard v. Johnstone, 3 Taunt. 177. 220.

meaning, and to express more clearly what has been obscurely expressed; and therefore," he adds, "if the supposed consequences were to follow, which I by no means allow, I should lean against the forfeiture, and leave it to the legislature to correct the evil, if there be any." With this rational and equitable rule, the practice of the Quarter Sessions, under the Toleration Act, has uniformly and publicly corresponded; but the legislature, far from interfering to straiten that enlarged interpretation of its doubtful enactment, which it has constantly witnessed, and to which its attention has been repeatedly drawn, has only altered the law, to render it more liberal, more indulgent, and more comprehensive:* while the reception which it almost unanimously gave to the only measure that has been proposed of an opposite tendency, (1811), is still fresh in the recollection of all men.

This view of the subject has, however, been placed in a ludicrous light, by the observation, that if it had been correct, the eighth section would not have been limited to persons in Holy Orders, &c. or indeed to any particular description of persons, but its benefits would have been unreservedly thrown open to *all mankind*. And the argument certainly does go to the full extent of maintaining that every person, who thinks proper to prefer his claim to qualify, in the terms of the act, is admis-

* 10 Ann. c. 2. 19 Geo. 3. c. 44.

sible to do so. Why then, it is asked, were any restrictions introduced? Why were not *all men* invited and authorized to qualify? The answer is obvious: Because it was needless to make the indemnity more extensive than the liability to punishment, because no man was likely to claim that indemnity, unless he stood in need of it; and because the very claim put him in jeopardy. As long as it is safe to trust a man's word, when he speaks against his own interest, so long you may believe him who tells you he is a teacher of a dissenting congregation, for it is pleading guilty to an offence against the Conventicle Act; and in the same manner, he who styles himself a person pretending to Holy Orders, by that assumption furnishes evidence which could not possibly be obtained from any other source, and which may contribute to his own conviction, for a transgression against the Five Mile Act.

: Had the legislature entertained the design of empowering the justices to interpose between their bounty and the objects of it, by instituting a scrutiny which might possibly defeat it, would not that intention have been manifested in plain and direct words, investing them with all the several powers, which could render their enquiry effectual? But if, on the other hand, the Court was to be *merely ministerial*, selected as a convenient place of public resort, where all those who believed themselves within the peril, might, at their own choice, obtain the protection of the law,

by solemnly assuming the obligation of an oath, in conjunction with other acts, (a religious declaration, and the subscription of assent,) in which the Court is not even ministerial; is it possible that the law could have employed, to effectuate such an intention, language more correct or appropriate, than that which refers the party's right to qualify to his own claim or pretension?

Indeed, in the ordinary concerns of life, a man who states that he pretends to any thing, is commonly thought by his ~~very~~ statement to pretend *men* to it, nor is it very easy to conceive in what other manner he can so pretend. The most solemn form of judicial proceeding, in which a plaintiff claims his most valuable rights, is nothing more than pretending to them. Whether the pretence be true or false, (for it may be either) is quite another thing. And yet, no small degree of prejudice has clouded this question, and created an unwillingness to accord the humble privilege of escaping fine and imprisonment, for doing what a man believes to be an indispensable religious duty, because it is founded on a *mere pretence*. If this be a fault, it is solely to be charged on the legislature. But that the word did not, in former times, involve any notion of falsehood, is evident from the epithet of *false* with which the law has qualified it, where it is meant to impute fraud. Johnson, as Mr. Smith

has observed, explains the verb as synonymous with *to claim*; and one of the definitions assigned by him both to *pretence* and *pretension*, is, "claim true or false."

Pope, in his celebrated address to Bolingbroke:—

(Say, shall this verse to future times *pretend*,
Thou wert my guide, philosopher, and friend)

certainly did not wish his verse to convey a falsehood to posterity. And it is a little curious to observe, that even according to modern usage, in which the verb *to pretend*, and its derivative *pretence*, have certainly been so far warped from their original meaning, of a mere claim, or setting forth, as to involve some suspicion of unfairness, *pretension* actually carries the very opposite sense. We might in common conversation unconsciously and not incorrectly say, Caius sets up a *pretence* to a title or an office, and indeed he has some *pretensions* to it.

If it were worth while to pursue these etymological remarks, we should, perhaps, find, that an unfavourable turn had been insensibly given to the word in question, by our familiarity with it in history, as describing an unfounded claim to the crown. The *pretended* prince of Wales is he who falsely claims that illustrious rank; the *pretender* is he who sets up a title which the majority of mankind disallow. But the word *claim*, or any other word equivalent to it, would have fallen

into the same disrepute, if it had accidentally performed the same office. When we speak of him who *claims* to be king, or of him who *styles himself* prince of Wales, we implicitly negative his assumed character, by not adopting it. Knowing, as we do, who is really entitled, we deny the right of any one, whose title we permit to rest on his own statement. But if we were as ignorant of his person and his rights, as the Court of Session may, without irreverence, be presumed to be of the rites and mysteries of sectarian ordination, we should imply neither charge nor suspicion, when we affirmed that he declared himself to be in any particular situation, or called himself by a particular name, or claimed a given character. And the word *to pretend* had exactly the same force in the days of Charles the Second and William the Third.

The nature of the enquiry proposed to be submitted to the Court of Quarter Sessions, ought to be fully considered. If the strange question is to be at all examined, whether he who *says* he *pretends* to Holy Orders, does in fact so pretend; or if it is to be ascertained, whether the pretensions of such person be well or ill founded, the investigation of Holy Orders themselves, among the various sects of protestant dissenters will become the necessary duty of the magistrates; and no judgment could be formed on such a subject, without a perfect knowledge of all the institutions which have at any time prevailed among all the numerous divi-

sions of Nonconformists. It has been said, indeed, that a person pretending to have received ordination, may very easily state from whom he received it, where and how, with what forms and ceremonies it was accompanied; and that a student for the ministry, undergoing a course of preparatory discipline, can have no difficulty in fully describing what that discipline has been, what progress he is making, in a word, of how much theology he has obtained the mastery. And as all this information is to be laid before the Magistrates, as a test of the *bona fides*, with which the applicant requires to take his qualification, and to shew that his statement is not merely colorable, the inspection must be scrutinizing, rigorous, and enlightened, conducted with knowledge and acumen sufficient for the detection of imposture, the refutation of error, and the confusion of ignorance. Without the slightest disrespect towards that useful and honourable body of men, we may be allowed to doubt whether they are peculiarly fitted by education or by habit to pursue similar enquiries with success; and those who are best able to appreciate their important and disinterested services to the community, will perhaps be the least anxious to see them so employed.

Very strange it would certainly be if the Court of Sessions had possessed, without exercising, and indeed without knowing or suspecting that they enjoyed, all the diversified powers and duties of such an ecclesiastical tribunal, for a period of

a hundred and fifty years, commencing with the promulgation of the Five Mile Act. But it would scarcely be less extraordinary, that they should be endowed with an authority so novel, and so foreign to their ordinary functions by a law, which lays down no rules as to the mode of exerting it; nor points out any method of proceeding for the ascertainment of facts the most difficult and abstruse. Indeed the nature of the right thus asserted on their behalf, is not very clearly defined. Is it that they are merely to examine the applicant, as to his meaning, when he calls himself a person pretending to Holy Orders, and, if satisfied with the correctness of the answers given by the catechumen to their interrogatories, are they then bound immediately to admit him? or are they impowered, also to administer an oath to him, as to the truth of the facts, in which he shall have stated his pretensions to consist? Or may they go yet farther, and require other testimony in support of the truth of those facts, and call witnesses on the other side, to contradict his assertions upon oath?

If the applicant is alone to be examined, it is easy to see that the scrutiny would either speedily become a mere form, as parties, having discovered what answers had once been deemed satisfactory, would uniformly come prepared to give the same; or that if, in different counties, or at different times, the Sessions were to act according to different rules, uncertainty and litigation would be infinite,

writs of mandamus innumerable, and the expence to Dissenting Ministers of asserting their rights, scarcely less intolerable than acquiescence in the fines and imprisonments inflicted by the former laws. But if other witnesses are also to play a part in this new drama, we may ask not only for the enactment which enjoins, but also for the precedent that sanctions, and the principle that warrants so strange and anomalous a proceeding: a judicial enquiry without parties, without summons, without notice, without process, affecting only him, who, invited by the proffered lenity of the law, comes to own himself amenable to it; without any charge except that which he brings against himself; without any plea, but his own spontaneous acknowledgment of guilt; without any judgment, but that by confession which the voluntary culprit denounces on his own unfortunate head, and which deeply involves his own future interest and safety, while it is utterly useless to any other person in existence,

The obscurity of the eighth section being urged as the principal reason for giving the power of scrutiny, and that obscurity being confined to the single phrase *pretending to Holy Orders*, is it argued that the Magistrates possess the same power, with respect to those classes, whose description is involved in no ambiguity whatever? If a person presents himself as *being* in Holy Orders, thus speaking at least in language suffi-

ciently intelligible, while he uses the very words of the Act, is he to be called upon for an explanation of the sense in which he comprehends them, and rejected, if the Court conceive it to be incorrect? For example, it is well known that the Church of England recognizes the validity of Romish ordination; but the Court of sessions might very probably hold the indulgence of the law to be confined to Holy Orders conferred by the established Church. But supposing the justices to agree with the applicant in his notion of Holy Orders, or even of pretended Holy Orders, in a case where the claim was so made, is he compellable to prove what bishop laid his hands upon him, or what presbyter offered prayers, when he was received into the ministry? The answer, whether in the negative, or the affirmative, could not be very easily maintained, for it seems equally hard, on the one hand, to throw this burden on those who are brought within the Act by the most unequivocal language; or to contend on the other, that there can be any difference in the mode of proceeding, where the same right is conferred in the very same terms, by the Legislature, on the several persons, whom it happens to describe with different degrees of precision.

To say that the Magistrates must necessarily have a right to institute these enquiries, as a salutary restraint on the extreme latitude, which belongs to the particular phrase, is in effect to

claim for them that absolute discretionary power which we may perhaps, in this stage of the argument, venture to call exploded, in a disguised and a more exceptionable shape. In either of these cases, the applicant's right to qualify would be made to depend on something unconnected with his own will: and it is to him quite unimportant whether he is excluded from Toleration, and an object of criminal justice, because the Magistrates in their discretion refuse him a *licence*, or, in the exercise of their judgment, declare him out of the protection of the Law. It may be doubted indeed, whether the former principle would not be more favourable than the latter, since a corrupt, a capricious, or an erroneous use of discretion may be controuled and rectified by the Court of King's Bench, while the refusal, from whatever motives proceeding, if it assumed the form of a deliberate sentence, pronounced by a Court of competent jurisdiction, on a point regularly falling within their authority, could not so easily be questioned. If a mandamus were directed to justices possessed of this authority, commanding them to admit A to qualify, as a person pretending to Holy Orders, it is apprehended that they would make a valid and final return, by stating that they had examined and adjudged him not to be a person so pretending; and that the sufferer by such an adjudication could not avoid the effect of it, either by traversing the judicial *opinion* so pronounced, or by bring-

ing any action for a false return. If indeed the Magistrates were to return a matter of *fact* as found in the negative, of which the affirmative had been unequivocally established, here a proper foundation would be laid for drawing their return into legal question; the issue on such disputed point would be referred to the decision of a jury, whose verdict would regulate the final granting of the writ of mandamus.

Suppose for example a person to apply to the Quarter Sessions, who on being questioned as to the nature of the Holy Orders, to which he pretended, should declare them to be Holy Orders conferred by the authority, and according to all the ceremonies of the *Erastian* Church. The Court of Quarter Session, if they happened to hear of this sect now for the first time (which is not quite impossible) must necessarily institute an immediate inquiry into the discipline, the nature and the degrees of spiritual authority belonging to that communion,* for the purpose of comparing them with the mode of ordination alleged by the applicant. Perhaps the evidence may fail to

* The argument and the illustration are equally good, whether the *Erastian* body does or does not, at this day, possess that importance which is attributed to them by Baxter, who places them apparently on a level with the *Episcopalians*, the *Presbyterians*, and the *Independents*, mentioning these four sects as constituting the whole religious world at the time of the civil war. Their difference appears to have proceeded almost entirely on points of discipline.

establish, to their satisfaction, that he has complied with all the ceremonies which they may deem essential to the validity of an *Erastian* ordination, and his claim to qualify may be refused. He sues out his writ of mandamus, to which the magistrates return, as their justification in rejecting him, that he has failed in the observance of such a particular form. The opinion of the Court of King's Bench might here be taken on the point of law, whether that form is or is not essential to the character of an *Erastian* minister,—a point on which it is presumed that the law books could not reasonably be expected to throw much light,—or the party might bring his case before a jury, and endeavour to convince them by evidence, that he had in fact done all which the Court of Session, in the judicial exercise of their ecclesiastical functions, thought requisite on the occasion.

This is so far from being an unfair specimen of the questions, which our opponents would bring under the cognizance of the Court of Session, that in truth they could not possibly have to entertain any of a different nature: and the subject might be easily traced into an endless variety of ramifications, if enough had not been already said to prove that the opposite course, sanctioned as it has incontestibly been by unvarying practice, is at least more intelligible and less difficult to be pursued. That practice, during the period of one hundred and twenty years, has been found effectual

for the avowed purpose of the Act,—the relief of Protestant Dissenters,—and has never till very lately been thought injurious to any other portion of his Majesty's subjects. This important fact is alone sufficient to outweigh the strongest arguments *ab inconvenienti*, devised by the ingenuity of modern times in favor of a different construction, more particularly when such arguments as were at first started for that purpose, are founded in pure error, which vanishes before the first enquiry. Qualification under the eighth section does *not* exempt from military service, or dispense with the execution of parochial offices. But an inconvenience of a very different character is now charged upon this mode of construing the law, and is supposed to be so extensive and alarming, as to render the immediate adoption of the opposite interpretation irresistibly necessary; the inconvenience of suffering every wild enthusiast, every ignorant fanatic, every hypocritical pretender, *all mankind* in short, who choose to come before the Magistrates, whether able to give what those magistrates may deem a rational account of their pretensions or not, to preach religious doctrines with impunity.

That kind of reasoning, which ascribes a particular intention to the legislator, not because he has used such language as may properly express it, but from the apprehension of consequences which the reasoner considers mischievous, may be truly represented in general terms, as being of all others the weakest, the least conclusive, and the most

fallacious, even where the law has recently been promulgated or when circumstances have prevented it from being put into general practice; but when that law has existed in full vigor, and the apprehended mischiefs have notoriously continued for more than a century without complaint, there is something extremely curious in employing them to overturn the construction, from which they have resulted; more particularly when that, which some persons have lately been disposed to aggravate into an enormous grievance, has been long considered by the most enlightened men, as the precise object in contemplation with the makers of the law. The unlimited right of advancing religious opinions, by all such as will consent to give the necessary securities to Government, would perhaps have been generally stated from 1689 to 1810 as the design and principle of the Toleration Act; it is only within the last two years that the exercise of that right has been discovered to be in itself so serious an evil, as to call for the revival of penal laws which in all probability have only been literally in force, because they have been virtually suspended.

For the purpose of leaving no single argument on this subject untouched, the balance of adverse inconveniences shall be stated in a single word: a full consideration of it would open too wide a field for political and theological disquisition. Let the alleged evil then be described, and, for the argument's sake, admitted, in the strongest pos-

sible terms ; and afterwards let any reflecting man deliberately compare it with the remedy proposed.

That remedy is neither more nor less than
RELIGIOUS PERSECUTION,



POSTSCRIPT.

SINCE the foregoing pages were printed, the author has been favoured with an answer to his former pamphlet ; and he begs leave to acknowledge with gratitude that courteous and complimentary language towards himself, which he is too conscious that the partiality of friendship could alone have suggested. He does not, however, disclaim the praise that may belong to the love of " fair and unreserved discussion ;" or to a perfect readiness to renounce, on conviction, any opinions, however carefully weighed, and however deliberately adopted ; and, though he does not affect, in the present instance, to have become a convert to the doctrines advanced against him, he is indebted to the acuteness of his friendly and respectable opponent for correcting some particulars, and would have been equally willing to attribute a more general alteration of sentiment to that union of zeal, learning, and ability, which his " Answer" displays.

It is candidly admitted, that the *general* opinion has been in favour of the conclusions drawn

by the Legal Argument, though not in the extent there asserted, as exceptions are said to have been made to the prevailing construction of the act, in five English counties, and one Welsh county. *Two* particular cases of rejection are mentioned; one in the county of Buckingham, five years ago; the other more recently, in Caernarvonshire. The former of these claims having been made in the character of a *teacher*, while the party informed the Court, that he had no congregation, the propriety of that rejection is unquestionable; for his own statement proved, that he did not fall within the description of the act; but if he had claimed as a person pretending to Holy Orders, and had been rejected for want of a congregation, the cases of Denbighshire* and Gloucestershire, † decisively prove, that the magistrates would have acted erroneously. In Caernarvonshire, the refusal of one calling himself a *Methodist* teacher, seems to have been perfectly right, for there is no such description in the Act of Toleration; and to allow magistrates to examine whether it may not be *equivalent* to some of the words there used, would be to grant them that very judicial power against which we have been engaged. But that the rejected applicants chose rather to acquiesce in any opinion

* 14 East. 285. See particularly what is said by Mr. Justice Le Blanc.

† Which was decided in Easter term, 1812, in favor of the application.

of the magistrates, than to question it by the expensive process of *mandamus*, is not surprising, for Berkshire was at hand to grant what Buckinghamshire refused; and the teacher who failed at Caernarvon, might effectually secure himself at Machynlleth, at the next Quarter Sessions, or perhaps on the following day.

It is not stated how long even these exceptions have obtained; they may have been first introduced within these ten years, or within a still shorter period: that "lawyers eminent for their learning and sound judgment," have doubted its correctness, might be said of any interpretation of any Act;* and upon the whole, no important deduction appears to be attempted from the alleged universality of that, which is indeed fairly confessed to be "the general persuasion." (p. 10.)

The practical disuse of the penal laws is supposed (p. 16.) to be overstated in the Legal Argument. To this the author can only reply that he believes the contrary; he believes that multitudes, even of the dissenting body, were not aware of the penalties to which they are exposed, till they were startled from the repose of ages by recent convictions. Their applications to Parliament have been directed to the repeal of the Test and Corporation Acts, not of the Conventicle and Oxford Acts. He did not *complain* of the

* P. 5 of the Answer.

trial by jury, in Kent's case, but truly stated the proceeding to be unusual. He may be mistaken, but he confidently believes that well informed Englishmen in general, magistrates and lawyers among the rest, are, or till very lately have been, ignorant of the practical legal consequences of refusing qualification at the Sessions to those who who apply for it.

The arguments said to be drawn from the militia laws are pronounced (p. 17.) inconclusive and inapplicable. The author was not aware that he had drawn any argument from those laws, which are set forth merely in order to comprise in one view, the whole of the legislative enactments affecting dissenters, whether ministers or laymen. It was material to shew, that the classes relieved from punishment, and those invested with privileges were, and from the commencement had been, totally distinct; but what appears to be intended as a refutation of that argument, is in truth, the very argument itself, clothed in much better language: "the object of the Toleration Act is to give freedom of religious opinions and worship to dissenters from the Established Church; while the militia laws, except in their clauses of exemption," (it might have been said, *even* in their clauses of exemption) "are totally unconnected with that object." (*Ib.*) But the legislature is in no part of the Legal Argument charged with any inconsistency, nor is such charge at all necessary to ~~his~~ reasoning.

The author's assertion * that the certificate granted by the clerk of the peace, is no evidence of the *character*, in which the oaths were taken, he still deems correct; and the practice which he has had an opportunity of ascertaining, has corresponded with his opinion. The certificates which he has seen, state merely that A B came and took the particular oaths,---not A B *being*, &c. It would be very material for the argument on the other side to prove that the certificate, "ought to vary according to the character, in which the oaths have been taken," (p. 18.) but till that proof is given, it will be enough to request the reader to compare our opposite assertions with the ninth section, which regulates the granting of certificates.

With respect to the meaning assigned to the word *separate* in the Legal Argument (p. 61.) and candidly adopted in the Answer (p. 20.) the author must own, that he has been compelled by farther enquiry, to entertain great doubts of its correctness. Mr. Calamy, a man peculiarly well informed on this subject, in his life of Baxter, which was published in 1702, gives a short abstract of the Toleration Act, called by him the Act for Liberty of Conscience, and emphatically employs the word *separate* in its present sense of *distinct*, (p. 653.) He states that according to its provisions "ALL teachers and preachers among the Dissenters,

* Legal Argument, p. 49, and the Answer, p. 19,

taking the oaths, &c., *licensing* the places in which they meet, and keeping the doors of such places unbarred and unbolted, should have free liberty to worship God according to their consciences." He afterwards gives the substance of the eleventh section in the following terms--- "That all such teachers and preachers in *separate* congregations should be thenceforth exempted from serving on juries, &c." But what the author loses in the word *separate*, he gains for his general argument, since the important distinction, so often contended for in the Legal Argument and the present pamphlet, here appears to have been expressly recognized at that early period; and "from this time" (adds Calamy) "the Dissenters were easie and thankful."

The author admits that he was mistaken in imputing to Mr. Addington's Militia Act, the effect of repealing the 10th of Queen Anne. He should have said that the exemption thereby conferred was less extensive than a full analogy to that Act would have made it, being limited to teachers licensed *within* the county, and leaving ministers who had qualified in another county, still liable to serve in the militia.

The confidence with which it was asserted that the sole object of the eighth section is to remove heavy pains and penalties, does not appear unfounded to the author. Indeed the answer given to this assertion scarcely amounts to a contradiction. "The privilege of exercising those offices

in future," (i. e. those of Dissenting teachers) "*unmolested by pains and penalties* is granted to certain persons, &c." (Answer, p. 21.)

In the same page, a *glaring inconsistency* is charged by implication on the author of the Legal Argument, because it appears in a work, of which he is said "*nearly to adopt the sentiments*" by highly recommending it. This is perhaps extending the doctrine of constructive error somewhat too far, particularly as the coincidence of opinion is explicitly confined to a specific point, though the tract is characterized (in the author's opinion most justly) as a very able one. He is quite ready to say as much of the pamphlet, on which he is now venturing to offer his observations.

Notwithstanding the remarks made in pp, 22 and 23 of the Answer, the analogy which was stated between the Test Act and the Toleration Act still appears to the author to have been correctly drawn. Under the former, persons invested with offices, under the latter, combined with former laws, persons officiating as dissenting ministers, are liable to penalties, unless they take the oaths respectively imposed upon them; in the former case, the bare statement of the party that he fills the office has uniformly been thought sufficient to entitle him to qualify, the certificate of his having taken the sacrament being wholly collateral: why should it not then be sufficient for the party applying under the latter to

state in the same manner, that he belongs to that class, to which the oaths are to be administered?

The position that "the Court of Quarter Sessions are required to administer the oaths and declaration *not to Dissenters as such*, but to *all* persons who shall tender themselves for the purpose of taking and subscribing them," is condemned as "groundless and extravagant." (p. 23.) Let the reader judge. The words of the Act of Parliament, as set forth at p. 14 of the Legal Argument, are these: "which oath and declarations the justices of peace at the general Sessions of the peace, to be held for the county or place, where such person shall live, are hereby required to tender and administer to *such persons as shall offer themselves* to take, make, and subscribe the same."

When the Toleration Act is eulogised, as "very clear and unambiguous in its provisions," (p. 24,) after the admission already noticed that the general persuasion has been in favor of the more comprehensive construction of it, the paucity or rather the absence of decisions with respect to it, which may be taken as some proof that such persuasion has not been judicially questioned, is surely a farther confirmation of its justice. That eulogy may indeed appear a little inconsistent with the assertion at p. 27; that "whether a man can reasonably pretend to Holy Orders" is a question "open to a variety of constructions," and is "also

partly a question of law," on which "the judgment of the Court of King's Bench might be had in *every difficult and disputed case*." The word *reasonably* is however no part of the Toleration Act; if it were, or if the magistrates were in effect required to pronounce whether *pretence to Holy Orders was reasonably made*, the author fairly confesses that he should have found it very difficult to maintain the point which is conceded to him, that they have no power to enquire into the fitness or unfitness of the applicant.

It is not from disrespect to the memory of the venerable prelate, whose powerful metaphor he borrowed* with reference to the laws against nonconformists, that the author corrects the expression of having quoted Bishop Horsley "as friendly to religious liberty,"† but because he is not sufficiently acquainted with his lordship's writings on that subject, and still farther because he feels it necessary to disavow, as he did when he first undertook the *Argument*, all discussion on the great question of religious liberty. From the same motive, he abstains from remarking on the topic of Toleration in general, to which so many pages of the answer are devoted, though strongly impressed with its importance, and by no means satisfied with the conclusions there drawn. He has endeavoured to argue the question, simply on its *legal* merits; and having adverted to the more important particulars which have been ob-

* *Leg. Arg.* p. 9.

† *Answer*, p. 29.

jected to him, he will say one word on the leading argument maintained by his opponent.

The claim of discretionary power for the Magistrates is now expressly abandoned (p. 11. p. 26); but it was against that discretion, which had in the Courts been as expressly claimed in their behalf, that the Author directed the strong language which has incurred animadversion (p. 11). It is now contended only that they have a judicial function to exercise, in enquiring whether parties applying to qualify come within the description, to which the Toleration Act proffers its benefits, on condition of their qualifying. This being the very subject of the foregoing Pamphlet, and the Author having there advanced all that occurs to him with reference to it, no farther observations shall here be obtruded on the reader: if the answer he has already given be unsatisfactory, he freely owns that he can carry his cause no farther. He begs leave however most distinctly to protest that in his judgment, no Court of Law has yet declared against his opinion: he considers the question as still being an open and legitimate subject for discussion, and will be the first to bow to any decision which may close the controversy, in whatever manner. The expressions at various times employed on the Bench, and supposed to be hostile to him, are perfectly consistent with his argument. That the party must bring himself "within the description," he readily admits, still however contending that the best mode of doing so is to follow the exact

words of the Law : that the Magistrates may refuse any one whom they know not to fall within that description, is equally incontestable ; but they may derive such knowledge from their own observation, or from the voluntary statement of the applicant. Their right to institute an enquiry for that purpose, is quite a different, and as the author conceives, still an undecided question.

The charge of exciting discontent with their situation among the dissenters, can hardly be thought applicable to one who contends that the law, as it now stands, and has been almost uniformly interpreted, secures to them all the privileges they can require : still less just would it be to ascribe to a "rash and injudicious" eagerness for *change*, an argument, which tends to sanction the general persuasion, and preserve the long prevailing practice. In all respects indeed the charge of innovation rests exclusively on those, who would invest the Magistrates with any other power than that which is alone conferred on them by the Act, and was alone, for so many years, exercised by them, viz. the power of administering the oaths. And when it is said (Answer, p.33.) that "nothing is necessary but to prevail on any number of persons exceeding five beyond those of a man's own household, to appoint him their teacher, and he and the place of his religious worship may be instantly legalized, though he may have no other pretensions whatever to a spiritual character," and that "no niceties as to the *suffi-*

ciency of different ordinations are recognized by the statute," the Author would merely ask why, according to this interpretation, persons in Holy Orders were distinguished by the Act from teachers of congregations, since an appointment by a congregation of six is here considered as equivalent to ordination; or why the phrase pretending to Holy Orders was introduced into it at all? He will not contrast this interpretation with that which he has attempted to defend, either with respect to the supposed danger of its excessive latitude, or its liability to frauds and abuses.

The necessity of sending his work to the press without farther delay will plead the Author's excuse for taking a more hasty notice than he could have wished of the Answer to his work. But though this postscript has been somewhat hastily composed, the opinions stated have been deliberately formed; and it is probable that a more detailed defence of them would have been in effect no more than a tedious repetition of what has been already submitted to the public.

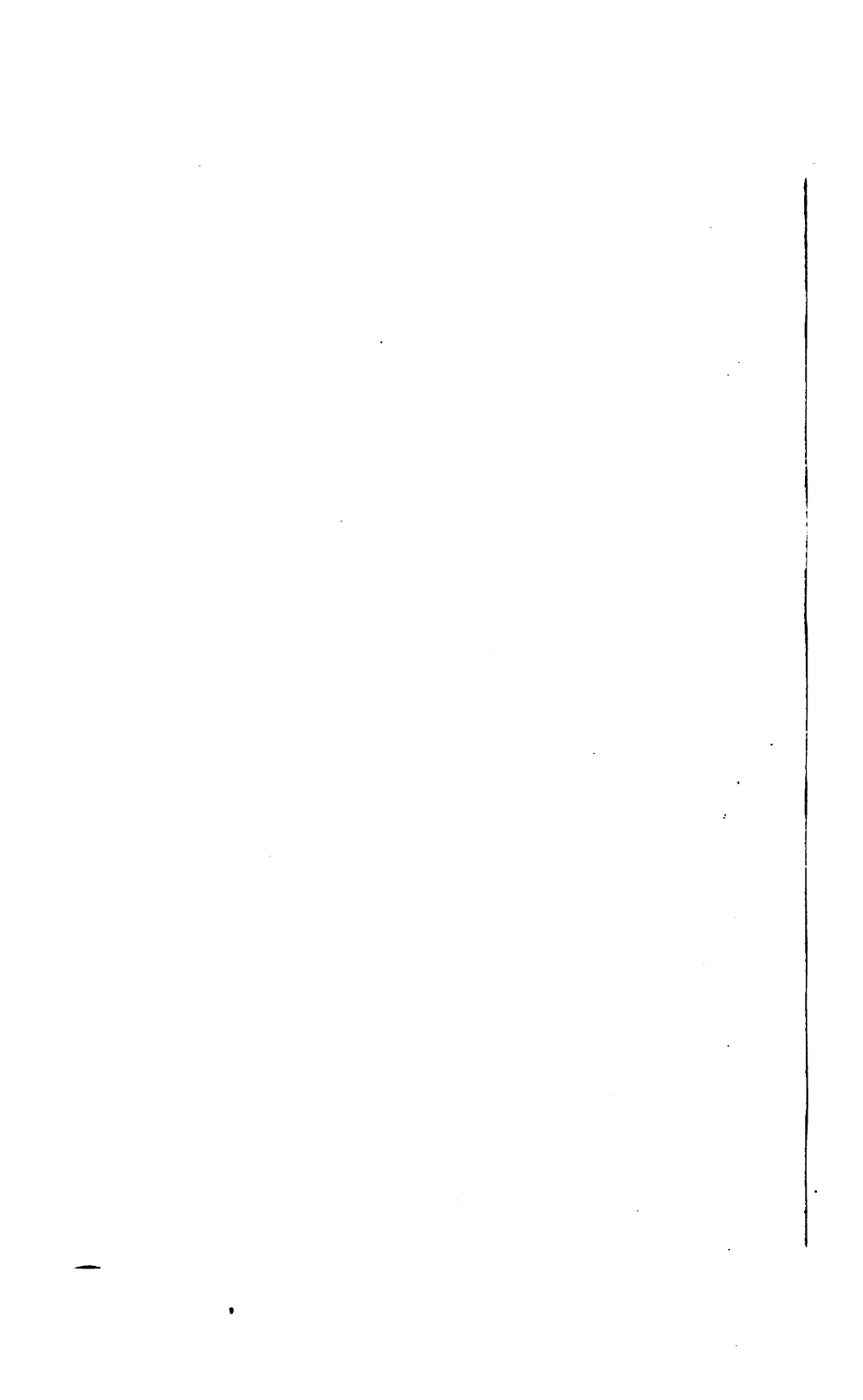
Lincoln's Inn, June 15, 1812.

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